UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH

FREEPORT MCMORAN BAGDAD INC.

and **Case 28–CA–257171**

PETE TARTAGLIA, JR., an Individual

Nicholas Gordon, Esq., for the General Counsel.
Ronald J. Stolkin, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

AMITA BAMAN TRACY, Administrative Law Judge. A trial was conducted in this matter by videoconference from January 25 to 27, 2022.[1] Haul truckdriver Pete Tartaglia, Jr. (Charging Party or Tartaglia) filed an unfair labor practice charge on February 26, 2020, against Freeport McMoRan Bagdad Inc. (Respondent).

A complaint and notice of hearing were issued on June 9, 2020. The complaint alleges Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) when on about February 21, 2020, Tartaglia's supervisor, JP LaFon (LaFon), in writing, threatened Tartaglia with discharge for filing charges with the National Labor Relations Board (the Board). The complaint also alleges that Respondent violated Section 8(a)(4) and (1) of the Act when about February 21, 2020, Respondent discharged Tartaglia due to prior unfair labor practice charges he filed,[2] his cooperation with the Board's investigation of those charges, and his threat to file another charge with the Board.[3] Respondent filed a timely answer, denying all material allegations. Counsel for the General Counsel (CGC) and counsel for Respondent filed posttrial briefs in support of their positions on March 3, 2022.

---

[1] On January 11, 2022, I issued a written order directing that this trial be conducted by videoconference due to the ongoing Coronavirus Disease 2019 (Covid–19) pandemic. The parties did not object.

[2] These charges include cases 28–CA–210296, 28–CA–234240, 28–CA–241240, and 28–CA–247609.

[3] Counsel for the General Counsel (CGC) sought to amend the complaint at the beginning of the hearing. Respondent did not oppose the motion, and I granted the amendment (Transcript (Tr.) 13–15; General Counsel's exhibit (GC Exh.) 2).

On the entire record,[4] including my observation of the demeanor of witnesses,[5] and after considering the posthearing briefs filed on behalf of the General Counsel and Respondent,[6] I make the following findings, conclusions of law, and recommendations.

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent has been a corporation with an office and place of business in Bagdad, Arizona (the facility), operating a copper mine. In conducting its operations during the 12-month period ending May 8, 2019, Respondent purchased and received at the facility goods valued in excess of $50,000 directly from points outside the State of Arizona. Thus, Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act). Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's Bagdad, Arizona Operations and Relevant Procedures

Respondent's copper strip mining operation, located in Bagdad, Arizona, runs 24 hours a day. Respondent owns the town of Bagdad, including all housing which is rented to the approximately 380 employees who work at the facility (Tr. 303). At the mine, Respondent's

---

[4] The transcripts and exhibits in this case generally are accurate aside from a few typographical and exhibit exclusion errors. Specifically, Respondent's exhibits (R. Exh.) 5, 50, and 51 are missing from the official transcript despite the exhibits being admitted into evidence (Tr. 481–483, 687–694, 719–722). However, I have reviewed these exhibits before rendering my decision.

[5] To aid review, I have cited to the record in my findings of fact, but the citations are not necessarily exclusive or exhaustive. Furthermore, my findings of fact encompass the credible testimony and evidence presented at the hearing, as well as logical inferences drawn therefrom. A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all–or–nothing propositions—indeed nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622. I will set forth specific credibility resolutions within the findings of fact.

[6] Other abbreviations used in this decision are as follows: "R. Exh." for Respondent's exhibit; "Jt. Exh." for Joint Exhibit; "GC Br." for the General Counsel's brief; and "R. Br." for Respondent's brief.

employees dig, drill, and shovel copper ore from the ground in multiple locations while haul truckdrivers transport the raw material to a processing center at the facility. Haul trucks are the size of a two-story house and can haul up to 300 tons of raw material. The drilling equipment includes an extended mast, approximately 60-feet in length, which when raised in the air can drill 50-foot holes in the ground (Tr. 406, 421). The drill moves at a slow pace of 1.6 to 2 miles per hour (Tr. 406, 560). All equipment is identified by electronic number displayed on the front of the vehicles (Tr. 420). Support equipment used at the facility maintain multiple haul roads and shovel pits. At the facility, approximately 60 pieces of equipment operate at the same time.

On the various equipment that the employees operate, each piece of equipment contains a radio where they may communicate with one another on various channels when they are working in the mine pit. Haul trucks, drills, and graders exclusively use radio channel 1 for communication (Tr. 139–140, 147–148, 367–368, 406, 629). Employees cannot talk over one another on the radio. A loud audible tone occurs if an employee attempts to speak while another employee is actively speaking on the radio (Tr. 646, 768). Thus, the transmission of a voice could not be missed. These communications are recorded, and to obtain a copy of the recordings, human resources must contact the information technology department to release the recording (Tr. 90–91).

Passing Procedures for Haul Trucks

Respondent maintains a standard operating procedure (SOP) when passing haul trucks in the pit (Tr. 76–77; R. Exh. 6). This SOP is also known as "making contact" (R. Exh. 6). Although the SOP discusses the procedures for an employee in a vehicle wanting to pass a haul truck, it is undisputed that this SOP also applies when a haul truckdriver wants to pass another employee including passing a drill operator (Tr. 76–77). When a haul truckdriver seeks to pass another vehicle, the haul truckdriver must contact the vehicle via radio and inform the driver it seeks to pass (Tr. 78). The haul truckdriver may not pass until he receives approval from the driver he seeks to pass (Tr. 77–79; R. Exh. 6).[7]

"Near Miss" Procedures

A "near miss" occurs when an accident to either vehicles, employees, or both, could have occurred but did not occur (Tr. 79, 174–175). When a near miss occurs, employees have been instructed to "freeze" the scene and the supervisor or dispatch notified for an immediate investigation (Tr. 80–81, 173–174, 215). Near misses occur frequently (Tr. 79–80). O'Neill testified that the purpose of the near miss procedure is to ensure that employees maintain safety in the workplace (Tr. 140). O'Neill testified that employees are trained to recognize when a near miss occurs despite no injuries or physical damage occurring (Tr. 81). However, sometimes employees do not freeze the scene as trained (Tr. 82). These employees who fail to freeze the scene could be disciplined (Tr. 82).

[7] O'Neill testified that there have been instances where a vehicle may pass another without contacting the vehicle it passes but passing without permission does not occur normally (Tr. 79).

The employees are supervised by senior supervisor for mine operations Tommy O'Neill (O'Neill) who oversees all work shifts. Supervisor of mine operations, Steve Rusinski (Rusinski), and drilling and blasting supervisor, JP LaFon (LaFon) directly supervise employees, and report to O'Neill. Haris Kudadiri (Kudadiri) oversees the entire mine operations (Tr. 159, 270, 303–304).[8]

Problem-Solving Procedure

To resolve employee disputes, Respondent created a "problem solving procedure" which is explained in its Guiding Principles (Tr. 44–45; R. Exh. 1). Respondent offers employees "problem solving specialists" (who work for Respondent) to assist employees during the process—akin to serving as employees' representatives (Tr. 206–208, 357). The problem-solving procedure has four steps: step 1, step 2, step 3, and step 4; however, discharge cases skip step 1 and proceed to step 2. At any step, a supervisor or higher-level official may overturn a disciplinary action given to an employee. The problem-solving procedure culminates in an arbitration if the dispute is not resolved during the prior steps. The arbitrator is chosen by the employee after the employee is provided a list of arbitrators from the American Arbitration Association (Tr. 209–210, 359–360, 715–717). Generally, a decision rendered by an arbitrator is final and binding (R. Exh. 1).[9]

B. Tartaglia's Employment and Litigation History with Respondent

Pete Tartaglia (Tartaglia) began working for Respondent in August 2011 as a haul truckdriver (Tr. 324). As a haul truckdriver (officially classified as truck driver I), Tartaglia hauled waste and copper ore to the dump or crusher (Tr. 324). In 2017, Rusinski and LaFon served as Tartaglia's direct supervisors while O'Neill served as his second-line supervisor (Tr. 42–44). After several years employment with Respondent, in 2017, Respondent terminated Tartaglia. Tartaglia, not only disputed the termination, but after he was reinstated by an arbitrator, filed additional unfair labor practice charges which will be discussed further. These unfair labor practices are as follows: November 21, 2017 (case 28–CA–210296), January 14,

[8] The parties stipulated that during the relevant period O'Neill, Rusinski, LaFon, and Kudadiri are supervisors and agents of Respondent as defined by Sec. 2(11) and (13) of the Act.

[9] CGC, in a footnote of the posthearing brief, suggests that the problem-solving procedure violates Section 8(a)(2) of the Act thereby establishing discriminatory motive (GC Br. at 27 fn. 13). This allegation, which was not contained in the unfair labor practice charge or the complaint, was not fully litigate at the hearing as required by *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). Respondent was not placed on notice that this problem-solving procedure would be used to support a claim of discriminatory motive as CGC now claims that Tartaglia's "protestations" and "requirements to use that potentially unlawful process to resolve disputes" violates the Act (GC Br. at 27 fn. 13). I note that the problem-solving procedure, and its use by Tartaglia, was only presented as background facts in this proceeding. Thus, this allegation was not fully and fairly litigated. See *Dalton Schools, Inc. d/b/a The Dalton School*, 364 NLRB No. 18 (2016). I decline to consider whether the problem-solving procedure violates Sec. 8(a)(2) of the Act.

2019 (case 28–CA–234240), May 8, 2019 (case 28–CA–241240), and September 4, 2019 (case 28–CA–247609) (Jt. Exh. 4–7).

As background, prior to Tartaglia's February 21, 2020 termination which is at issue in this proceeding, on October 7, 2017, Respondent terminated Tartaglia for an alleged safety violation (Tr. 325). At the time of his termination, Tartaglia had recently bid and been awarded the position of shovel operator (officially classified as shovel operator I) but had not been yet trained (Tr. 712; R. Exh. 53). On November 21, 2017, Tartaglia filed an unfair labor practice charge with the Board disputing his 2017 termination (case 28–CA–210296).[10] During the investigation of that unfair labor practice charge, O'Neill provided an affidavit to the Board (Tr. 50–52). Tartaglia also filed a complaint with the Mine Safety and Health Administration (MSHA) (Jt. Exh. 4). Finally, Tartaglia appealed his termination through Respondent's problem-solving procedure, and his termination went to arbitration. In July 2018, Arbitrator Louis M. Zigman, Esq. (Arbitrator Zigman) overturned Respondent's decision to terminate Tartaglia (Tr. 210–212, 248, 327–328). During this arbitration, senior human resources specialist Dustin Mikes (Mikes) served as Respondent's representative (Tr. 210, 681).[11] Mikes also assisted during the problem-solving procedure at steps 2 and 3 as a note taker, but he was not involved in the investigation and decision to terminate Tartaglia in October 2017 (Tr. 681).

When Tartaglia returned to work in August 2018, Respondent placed him in the shovel operator position (Tr. 52, 713). To perform the shovel operator position, Respondent required Tartaglia to be trained (Tr. 713). Tartaglia began the training in October or November 2018 but in December 2018 Tartaglia requested to stop training which Respondent granted temporarily (Tr. 53, 116–117, 713). Tartaglia testified that he could not continue with training at the time due to Respondent's incorrect calculations of the backpay he should have been awarded, his housing issues, and his belief that he was working without pay (Tr. 328–-329, 331–332). O'Neill testified that Tartaglia told him that he had some issues that prevented him from completing the shovel operator training, but O'Neill denied knowing what specifically those issues were (Tr. 53). On December 20, 2018, Tartaglia wrote a statement, which he submitted to Rusinski and O'Neill, "This is Just to bring to the attention of Mine OPS [operations] That it is hard to train on a shovel when I have these issues that are hanging over my head. This is not a refussal to train on a shovel Just that this training be set back till I can get these issues resolved with FMI [Respondent]. To whom this may concern" (GC Exh. 3 (errors in original); Tr. 333–334, 464). Respondent delayed the training to accommodate Tartaglia's request.

[10] The outcome of this unfair labor practice charge was not entered into the record by the parties.

[11] The parties stipulated that Mikes is an agent of Respondent as defined by Sec. 2(13) of the Act. Mikes began working for Respondent in 2004 at the Morenci, Arizona location, and moved to Bagdad in November 2017. However, Mikes only began working as a senior human resources specialist for mine operations, the division in which Tartaglia worked, in September 2019 where he provided guidance to the supervisors and conducted investigations (Tr. 204, 212). Mikes investigated and provided advice to supervisors when Tartaglia was involved in the near miss in February 2020. Mikes' employment with Respondent ended in April 2020 (Tr. 204, 247).

Thereafter, Tartaglia filed an unfair labor practice charge with the Board on January 14, 2019, regarding his backpay award (case 28–CA–234240).[12] He also filed a complaint with MSHA about the same (Tr. 329–330; Jt. Exh. 5). Tartaglia testified that he spoke to several individuals at Respondent regarding his backpay award including senior human resources generalist David Fendrich (Fendrich) and Mikes (Tr. 330–331).

On February 6, 2019, Tartaglia submitted a statement to Rusinski stating that he was "still dealing with issues with [the company]" and did not have time for the shovel training until "this is taken care of" (GC Exh. 4; Tr. 171). Tartaglia testified that he had still not been reimbursed appropriately (Tr. 335–336). Tartaglia testified that Rusinski, O'Neill, and Fendrich attended this meeting, and said that he told them he had "issues dealing with FMI [Respondent]" (Tr. 336–337).

On February 22, 2019, O'Neill and Fendrich spoke to Tartaglia about the shovel operator position (GC Exh. 23).[13] O'Neill told Tartaglia that he needed to decide whether he wanted to continue with the shovel operator position or "go back to running Rubber Tires and Trucks" (Tr. 714).[14] O'Neill explained that because Respondent acquired another shovel, he needed operators. Thus, he needed a decision from Tartaglia as to which option he chose. In response, Tartaglia told O'Neill that he had told Rusinski to train another employee for the shovel operator position because he had "stuff" going on and did not have time to do the training. Tartaglia then told O'Neill and Fendrich he was placing them on notice due to the "stuff" he was dealing with (Tr. 62–63; GC Exh. 23). At the hearing, Tartaglia provided a post hoc explanation that when he placed individuals on notice, he meant that he is "advising them that I got an issue with them. I've presented it to them. Now they're placed on notice" (Tr. 535).[15] Tartaglia left the meeting without deciding as to whether he would train for the shovel operator position or go back to his haul truckdriver position after he was requalified (Tr. 714).

On March 22, 2019, O'Neill and Fendrich provided Tartaglia with a letter formalizing the February 22, 2019 conversation (R. Exh. 53). In this letter, Respondent again gave Tartaglia the option of completing the shovel operator training, beginning no later than April 9, 2019, and to be completed within 9 weeks, or be laterally transferred to the haul truckdriver position and to be requalified within 6 weeks of the transfer. O'Neill noted that the decision was Tartaglia's and that he needed to give an "unqualified" decision to Fendrich or himself no later than 5 p.m. on March 31, 2019. O'Neill further noted that if they did not receive a decision by that time, they would assume that he chose to laterally transfer back to the haul truckdriver position (R. Exh. 53).

---

[12] The outcome of this unfair labor practice charge was not entered into the record by the parties.

[13] O'Neill testified that he could not recall details of the February 22, 2019 meeting he held with Tartaglia due to the lapse in time (Tr. 63). Thus, I rely on his witness statement which has not been disputed and has been corroborated by Fendrich (GC Exh. 23).

[14] O'Neill and Fendrich testified that the rubber tire position is not a classification at Respondent so an employee would be classified as a truckdriver who cross-trains on a rubber tire or a shovel operator who cross-trains on a rubber tire (Tr. 59–60, 711).

[15] As discussed further, there is no credible evidence that Respondent's supervisors and agents, whom Tartaglia placed on notice, knew what he meant when he used that language.

Rather than providing a choice, Tartaglia testified that during this meeting he told Fendrich and O'Neill that he could not go to training because he had "just signed off on everything, so I—that's March 22nd. The first week of April, I already had everything scheduled" (Tr. 467). When questioned by Respondent's counsel at the hearing, Tartaglia explained that he had an MSHA investigation scheduled for that week along with trying "to get everything resolved" (Tr. 468). When further questioned on cross-examination, Tartaglia kept insisting that the complaints he filed with MSHA and the Industrial Commission of Arizona needed to be resolved before he could go to training (Tr. 339, 342, 467).[16]

On March 31, 2019, Rusinski met with Tartaglia. During this meeting, Fendrich called and spoke about the shovel operator training with Tartaglia (Tr. 338–339). Tartaglia then sent Fendrich an email to follow up on their phone call that day. Tartaglia wrote, "I made it clear to you Im not up for any training. I have a hearing that's coming up a Deposition as well investigations Still Stands. It was made clear to you when you handed me that letter. Im on the Rubber Tire Dozer and will stay there until everything is resolved. First things First. Still Stands . Final Response" (GC Exh. 5 (errors in original)). Despite this email from Tartaglia, Respondent enrolled Tartaglia in truckdriver training class on April 1, 2019, as O'Neill indicated he would do in his March 22, 2019 letter (R. Exh. 53).

On April 1, 2019, Rusinski wrote that he spoke to Tartaglia at 6:15 a.m., about starting haul truckdriver training, and that Tartaglia refused to start training "because he said that he had a lot of things going on with the company [and] he can not train on anything right now" (GC Exh. 19 (errors in original)). Rusinski testified that Tartaglia told him that "things" referred to hearings he had going on due to issues stemming from his October 2017 termination (Tr. 168). Thus, Rusinski placed him on investigatory leave with pay (IWP). Tartaglia wrote on the IWP form, "This is under protest. This is not a refusal as well. They are aware" (GC Exh. 19).

In an undated statement that Tartaglia testified he wrote on April 1, 2019, Tartaglia wrote, "I made it clear to David Fendrich I am not up for No Training. I have hearing, deposition, Investigations coming up. Its been made clear and he's aware of it. I made a phone call this morning to advise of these actions" (GC Exh. 6 (errors in original)). At 6:15 a.m., Tartaglia wrote another statement, writing, "I made mention to David Fendrich over and over again and continued to refuse to accept my side of anything. Ive made contact to agencys and Hes aware of that as well and these retaliations actions are what are being taken on behalf of FMI Bagdad. This will be reported as Retaliation" (GC Exh. 7 (errors in original)).

[16] Tartaglia also testified that he told Fendrich that he had a complaint with the Board against him (Tr. 344). However, Fendrich testified that he was not aware that Tartaglia was filing unfair labor practice charges with the NLRB as he filed them but learned about them months after they were filed (Tr. 744–745). I do not credit Tartaglia's testimony. In Tartaglia's written statements, Tartaglia never actually specifies the various litigation he has ongoing, but instead simply mentions that he is placing individuals on "notice," has "things" going on, and is dealing with "stuff" involving Respondent. Instead, I credit Fendrich when he testified that he did not know about these unfair labor practice charges until sometime later as he was never served the charges.

On April 11, 2019, O'Neill issued a final written counseling to Tartaglia for "refusal to do assigned work" (GC Exh. 18).[17] O'Neill wrote that Tartaglia twice refused to attend truckdriver training on April 1, 2019, which violated Respondent's guiding principles which are considered serious in nature and could result in immediate discharge. Tartaglia disagreed with the final written counseling as "not true" and signed under protest (Tr. 70).

After receiving the final written counseling, Tartaglia filed two unfair labor practice charge with the Board—(1) May 8, 2019 (case 28–CA–241240)[18]; and (2) September 4, 2019 (case 28–CA–247609)[19] (Jt. Exh. 6). Tartaglia also appealed the disciplinary action through Respondent's problem-solving procedure (Tr. 72, 347). Mikes, who was not involved in the investigation or decision to issue Tartaglia a final written counseling, represented Respondent by taking notes during the grievance step meetings (Tr. 213, 683). During the problem-solving procedure, Tartaglia accused Mikes of tampering with evidence and an unfair investigation despite Mikes not being involved with the evidence or investigation (Tr. 213–214, 459).[20] On May 3, 2019, at step 1, Kudadiri upheld the decision to issue Tartaglia a final written counseling for refusing to attend the assigned training (GC Exh. 27). On September 25, 2019, Respondent reduced the decision at step 3 of the process to a second written counseling for his refusal to do assigned work since Tartaglia was enrolled in haul truckdriver training at that time as well as his comfort in operating a rubber tire dozer, a task assigned to haul truck drivers (GC Exh. 8). However, Tartaglia declined to accept the step 3 decision and decided to arbitrate this final written counseling as he took the position that he should not have been disciplined (Tr. 350). On January 15, 2020, Arbitrator Zigman upheld the April 11, 2019 final written counseling issued to Tartaglia (Tr. 118, 351; R. Exh. 11).

Respondent's guiding principles note that progressive counseling consists of a first written counseling, second written counseling, final written counseling with or without unpaid suspension, and discharge. Furthermore, the most recent counseling remains active for 365 calendar days from the date issued (R. Exh. 1).

C. Tartaglia's February 21, 2020, Removal Stemming from a Near Miss on February 5, 2020

The February 5, 2020 Near Miss

On February 5, 2020, Tartaglia worked from 7 a.m. until 2:21 p.m. (R. Exh. 24). At around 9 a.m.,[21] while driving haul truck 129, he passed drill AC14 which was being operated by

[17] Tartaglia was also enrolled in the next available truckdriver training class.
[18] On May 29, 2020, the Board dismissed Tartaglia's unfair labor practice charge (R. Exh. 12).
[19] The outcome of this unfair labor practice charge was not entered into the record by the parties.
[20] Tartaglia's claim that Mikes tampered with the evidence and investigation is not credible since Mikes was not involved with either gathering the evidence or conducting the investigation that led to the final written counseling.
[21] The reported time the event occurred differed amongst the witnesses because the employees do not have clocks in the equipment nor are they permitted to retain their cell phones when on duty

Ron Eisner (Eisner) (Tr. 82, 361–362). In the cab of AC14 along with Eisner was truckdriver and drill trainee Montana Covey (Covey) (Tr. 405, 558–559).[22] Tartaglia and Eisner's equipment were moving in the same direction (Tr. 376). What happened next as to what was communicated over the radio between Tartaglia and Eisner is in dispute. Tartaglia's testimony differs drastically from the testimonies of Eisner and Covey as well as witness Ken Potter (Potter), who is a support equipment operator on grader 24 and was parked to allow AC14 to pass (Tr. 584–585).[23]

Tartaglia testified that he had been cleared to pass by Eisner, whose voice he recognized, before he asked to pass. Tartaglia testified that Eisner said that haul truck 129 was "clear to come around" (Tr. 362, 374–375, 377). Tartaglia then told Eisner that he was coming on his right side (Tr. 362). Tartaglia then passed Eisner on the right side. Tartaglia testified that as he was passing AC14, he heard Eisner say, "Sorry, I couldn't get on the radio" (Tr. 362, 368, 375). Tartaglia then proceeded to take his load to the dump (Tr. 363).

In contrast, Eisner testified that an unidentified haul truck passed him that morning without seeking permission (Tr. 410).[24] Both Covey and Potter testified that a haul truckdriver said to Eisner something to the effect of "AC14, can I come around your right?" or "AC14 on your right" (Tr. 411, 422, 560, 567, 597). Covey and Potter testified that Eisner said, almost immediately, to the haul truckdriver, "No, please hold back" (Tr. 560, 568, 573, 585, 597).[25] After denying the haul truck permission to pass, Eisner commented, "Sorry Southwest could not get on the radio." Eisner testified that this statement was in response to a different conversation where Southwest asked for permission to pass prior, but Eisner could not get on the radio (Tr. 422). Eisner commented that Southwest stayed behind him because he did not give permission to pass (Tr. 422–423). Despite Eisner's denial of permission, Covey testified that the haul truck came around AC14 on the right side (Tr. 560). Potter testified that the driver of the haul truck said as he passed, "Coming around your right" (Tr. 585). Immediately thereafter, Potter commented, "he said stay back" (Tr. 586). Eisner then spoke, "Well, actually I said please stay behind AC14 but it's too late now." Tartaglia did not respond (Tr. 586). Due to the haul truck tire vibrations and the proximity of the haul truck to AC14, Eisner stopped AC14 (Tr. 413, 560). Once the haul truck passed, Covey could see that the haul truck number was 129 (Tr. 561). Eisner and Covey denied the claim that Eisner told haul truck 129 to pass, and instead told the haul truckdriver to "stay behind please" (Tr. 411–412, 561). Eisner denied communicating with another truck telling the driver to come around his drill, and that prior to haul truck 129 passing without permission, a different truck passed him without permission (Tr. 412, 417). Later, Eisner learned that Tartaglia was the driver (Tr. 410, 422). It is undisputed that no employee froze the scene.

(Tr. 591). But due to the employee clock in times, the incident likely occurred around 9 a.m. since Montana Covey (Covey) signed into work to drive AC14 at 8:48 a.m. (R. Exh. 24).

[22] Since the hearing, Covey married, and her last name is now Warner (Tr. 557).

[23] The term "grader" is also referred to as "blade" or "blader" by the witnesses.

[24] Eisner, who worked for Respondent for 7 years, ended his employment with Respondent in November 2021 (Tr. 418–419).

[25] Potter recognized Eisner's voice because "he has a very distinctive voice" (Tr. 582).

Investigation of the February 5, 2020, Incident

Potter reported the incident to Rusinski approximately 45 minutes later when he first saw Rusinski (Tr. 589, 596). Potter testified that when he reported the incident to Rusinski, he assumed Rusinski already knew about the incident because Potter asked Eisner if he was going to report the incident and Eisner said he would (Tr. 599). Potter told Rusinski that he thought the driver of haul truck 129 was Tartaglia because he recognized his voice (Tr. 585, 596). Rusinski then asked Potter for a witness statement and asked him who was involved in the near miss and failure to freeze the scene (Tr. 589, 596). Potter told Rusinski that Eisner, Tartaglia and he were involved, but did not report Covey's presence since he was unaware that she was in the cab (Tr. 597). Potter wrote that at approximately 8:15 a.m. haul truck 129 asked for permission to pass AC14, which AC14 denied (R. Exh. 20; Tr. 590). Potter continued that despite the denial, haul truck 129 proceeded around AC14 which also risked damage to Potter's own equipment (R. Exh. 20).

Rusinski then asked Eisner for a witness statement which he provided approximately 2 hours after the incident (Tr. 415, 427). Eisner wrote that the near miss occurred at approximately 8:30 a.m. Eisner wrote that haul truck 129 asked for permission to pass which he denied. Eisner then wrote, "Next thing I see is that he went right at the moment when I was turning. I had to stop immediately in order to avoid my mast slamming into his cab" (R. Exh. 18; Tr. 413–415). Rusinski asked Eisner why he did not freeze the scene. Eisner explained that because haul truck 129 had passed, he did not believe it made sense to freeze the scene (Tr. 427).

At some point during the same day, Covey provided a witness statement when asked by Rusinski (Tr. 562).[26] Covey noted that the incident occurred at 8:30 a.m. Covey wrote that haul truck 129 did not slow down or listen to Eisner's instructions to "hang back." Covey continued that the driver of haul truck 129 said he would "just go over the windrow" (R. Exh. 19; Tr. 571).

Later that day, at approximately 12:15 p.m., Rusinski spoke to Tartaglia to get a witness statement from him about the incident (Tr. 177–178, 363). Rusinski told Tartaglia that he had been involved in a near miss, and Tartaglia responded that he thought he contacted AC14 (Tr. 179, 364, 475). Rusinski responded that he was told that Tartaglia did not make contact (Tr. 364). During his conversation with Rusinski, Tartaglia became upset that Rusinski had not spoken to him earlier in the day since investigations should commence immediately (Tr. 179, 364–366). Rusinski testified that he first obtained a witness statement from Potter, and then from other witnesses before he could speak with Tartaglia (Tr. 179). Rusinski then asked Tartaglia to write a statement (Tr. 365). Tartaglia wrote, "I was cleared to go around Drill. Blade #24 was off the road and he never answers radio. Didn't talk to me until 12:15 p.m. They say it happen at 8:15 am" (GC Exh. 20).

After providing his statement, Tartaglia asked to speak to senior supervisor, mine coordinator Chuck Stevens (Stevens), who was substituting for Kudadiri that day (Tr. 369, 613). Rusinski told Tartaglia that he would let Stevens know (Tr. 369, 604–605). Stevens testified that Rusinski told him that Tartaglia wanted to speak with him because they were investigating a near

[26] Presumably, Rusinski learned that Covey was also in the cab of AC14 that morning.

miss where Tartaglia passed a drill without permission (Tr. 614). Tartaglia went back to work (Tr. 370).

Thereafter, Rusinski informed Mikes and O'Neill about the near miss (Tr. 83–86, 217). Mikes advised Rusinski, and later Stevens, that because Tartaglia was on a final written counseling that he should be placed on IWP (Tr. 86–87, 218–219). O'Neill testified that sending an employee home on IWP commonly occurs depending on the circumstances of the near miss as well as at the level of progressive discipline, if any, that the involved employees had accrued (Tr. 86–87). Stevens, who was the senior official on duty at Respondent that day, made the decision to place Tartaglia on IWP (Tr. 86–87, 219).

At around 2 p.m., LaFon asked Tartaglia to park his vehicle and meet with Stevens (Tr. 370, 604). Tartaglia then went to meet Stevens. Rusinski and Mikes were also waiting for Tartaglia (Tr. 370–371). However, per Tartaglia's request, Stevens spoke with Tartaglia alone (Tr. 371, 604). Stevens testified that Tartaglia was upset because Rusinski took some time to get a witness statement from him regarding the incident that morning (Tr. 604, 615). Stevens testified that Tartaglia told him that he asked for permission to pass the drill and received permission (Tr. 605). According to Stevens, Tartaglia and he "got into it" (Tr. 605). Tartaglia testified that Stevens accused him of not contacting the drill operator and being lazy (Tr. 371). Tartaglia responded that he made contact and complained that protocols were not followed because the scene was not frozen, and he was not contacted for his witness statement until 4 hours later (Tr. 371, 615). Tartaglia told Stevens that he had seen a haul truck pass by without permission. Stevens told him that he would investigate where the haul truck was and asked Tartaglia to write another statement with more detail (Tr. 371, 605, 616). Stevens testified that he only reviewed Tartaglia's first written statement and had not seen any other witness statements (Tr. 616–617).

In Tartaglia's second witness statement of the day, he wrote that another truck, with an unknown number, passed ahead of him and never contacted AC14. Tartaglia also noted that grader 24, which was driven by Potter, was on the right side of the road with the blade in the ground not working. Tartaglia wrote that he had been "on" Potter the day before for not answering his radio. Finally, Tartaglia wrote that he was not contacted until 12:15 p.m., and that he had contacted AC14 (GC Exh. 16). Tartaglia testified that he included the information about Potter because Potter was not disciplined (Tr. 372).

Stevens informed Tartaglia that there would be a meeting on Monday, February 10, 2020,[27] and that in the meanwhile he would obtain the global positioning system (GPS) records from the engineering department (Tr. 378).[28] Stevens then placed Tartaglia on IWP (Tr. 378,

[27] The February 10, 2020, meeting did not occur (Tr. 379).

[28] After Tartaglia left the meeting, Stevens investigated whether Tartaglia received permission to pass and whether another haul truck passed AC14 without permission (Tr. 609, 617). Stevens asked Tartaglia's supervisor to get the information from dispatch (Tr. 609). The supervisor reported that there was not another haul truck that passed before Tartaglia (Tr. 609–610, 620). Stevens did not independently review this evidence (Tr. 620). Thereafter, Stevens was not involved in Tartaglia's subsequent discharge, and he did not consult with anyone else including

606; R. Exh. 30). Stevens testified that he placed Tartaglia on IWP because when an investigation is conducted "the people involved may be mentally hijacked, so we place them on IWP" (Tr. 607).

On February 6, 2020, Mikes informed Fendrich of the February 5, 2020 incident involving Tartaglia (Tr. 746). To investigate the incident, Mikes obtained a recording of the channel 1 radio transmission from the information technology department via a ticket request where he specified the timeframe (7:30 to 9:30 a.m.) (Tr. 235, 627–628, 651; R. Exh. 13).[29] Mikes received the recording in a file format via email (Tr. 235, 627). Thereafter, Mikes and Fendrich listed to the entire recording together on February 6, 2020 (Tr. 651). Fendrich testified that the recording in the system can only be extracted and listened to and cannot be altered (Tr. 638).

February 13, 2020, Meeting with Tartaglia

On February 12, 2020, O'Neill met with Mikes and Rusinski to review the incident. O'Neill listened to the recording of the channel 1 radio transmission during the time of the incident, from 9:09 to 9:11 a.m., and read the witness statements collected by Rusinski (Tr. 88–92, 98, 121, 139-140; R. Exh. 14).[30] O'Neill testified that he identified Tartaglia as stating that

---

O'Neill, Kudadiri, and Mikes (Tr. 610–611, 621). As Stevens was not involved in the investigation or decision to terminate Tartaglia, I have not considered his testimony regarding what he learned from the unnamed supervisor.

[29] Respondent records and stores two-way radio traffic at the mine on a system called Eventide NexLog (Tr. 626). The February 5, 2020, recording of the time from 7:30 to 9:30 a.m. is separated into individual files chronologically (R. Exh. 17). The system records voices, which is triggered using the radio, but pauses recording when there are no voices (Tr. 641, 643). When the system begins recording again, a new file is created with the time stamp of the start of the recording and duration (Tr. 641). Thus, the February 5, 2020 recording is not 2 hours in length, but instead one hour and 9 minutes in length due to talking time (Tr. 639).

[30] The audio recording, which is a compact disc, is labeled as R. Exh. 13 but was entered into evidence as R. Exh. 14 (Tr. 121, 128). Thus, I will reference the audio recording as R. Exh. 14. The recording does not indicate the time of the recording, the date stamp, the location of the speakers or identify the speakers. The time of the recording and date stamp are found by reviewing the file folder. Prior to Tartaglia's termination, Fendrich told Mikes to create a written transcript of this recording (Tr. 663–666; R. Exh. 15). Fendrich then added the names of the speakers on the transcript Mikes created (R. Exh. 16). Fendrich testified that he identified the speakers by voice as well as information pulled from dispatch which identified who drove the vehicles during the period (Tr. 667–672; R. Exh. 24). At the hearing, Eisner listened to the recording and testified that the recording was accurate as to what occurred (Tr. 412). Fendrich also testified that the recording in the Eventide NexLog system that he heard with Mikes, and the recording entered into evidence as R. Exh. 14 are the same (Tr. 639). CGC disputed the admission of the transcript as hearsay but did not explain which portions of the transcript to which he disputed. I heard the recording several times and find that the transcript is accurate. No witness disputed the recording, and thus, I rely on the transcript as probative evidence.

he sought to pass AC14 "around your right side" (Tr. 124). O'Neill also identified Eisner who replied to Tartaglia's request, "No, stay behind please" (Tr. 125).

The recording and transcript reflect that the following statements were made on the radio while the employees worked on February 5, 2020, beginning at 9:09 a.m. (R. Exh. 14, 15, and 16).

- Shovel 8, single to the right, single to the right, shovel 8 (statement by John Boyer)
- Grader 25, 203 coming up on your left (statement by Matthew Roderick, truck 203)
- Come on (statement by Corey Tham)
- AC14, around your right side (statement by Tartaglia)
- No, stay behind please (statement by Eisner)
- Sorry Southwest, could not get on the radio (statement by Eisner)
- AC14, around your right side (statement by Tartaglia)
- He said stay behind (statement by Potter)
- Well, actually, I said please stay behind AC14 but it's too late now (statement by Eisner)
- He just trashed the tires on that windrow (statement by Potter)

After listening to the recording, O'Neill decided to issue Tartaglia a nonverbal written coaching for passing AC14 without permission (Tr. 93, 141). O'Neill testified that Rusinski and Mikes gave no opinion as to whether the nonverbal written coaching to be issued to Tartaglia was appropriate (Tr. 94, 220, 222). Based on O'Neill's decision to issue a nonverbal written coaching, which is not considered disciplinary, Mikes and Fendrich drafted the coaching and feedback form to be issued to Tartaglia (Tr. 95, 684). The coaching stated:

> On February 5, 2020, you were operating Haul Truck 129 when you called and asked for permission to pass AC14. You failed to follow proper radio procedure and identify yourself with your equipment number. The operator of AC14 told you to please hold back, again you improperly called AC14 and asked for permission to pass and again you were told to hold back. You proceeded to pass AC14 without getting the proper permission to pass.

As an action or follow up, Tartaglia needed to follow proper radio protocol, including using equipment numbers, and getting proper permission to pass before passing other equipment (GC Exh. 26).

Fendrich testified that since the witness statements and radio recording were contradictory to Tartaglia's two witness statements, the managers wanted to present this evidence to see if his memory would be refreshed (Tr. 88, 99, 119–120, 183, 379, 685; R. Exh. 14, 56). Thus, on February 13, 2020, O'Neill, Mikes and Rusinski met with Tartaglia at about 7:30 p.m. so Tartaglia could listen to a recording of the February 5, 2020 radio transmission, from the time from 9:09 to 9:11 a.m.

The February 13, 2020 meeting with Tartaglia occurred in O'Neill's conference room (Tr. 99). Mikes began the meeting by telling Tartaglia that they had a recording that they wanted him to hear that indicates that Tartaglia had not been cleared to pass (Tr. 380–381). Tartaglia

then asked who was driving the haul truck ahead of him, and Mikes told him that they would play the recording (Tr. 380). Tartaglia testified that he pointed out that he was saying "on the right, on the right" to AC14 contrary to the accusation that he did not gain permission to pass (Tr. 381). Thereafter, Mikes played the radio transmission for Tartaglia (Tr. 99, 121, 186; R. Exh. 14). Mikes disputed Tartaglia's claim that he had received permission to pass, and Tartaglia asked to play the recording again (Tr. 381).

Mikes played the recording again, and Tartaglia testified that he heard the driver of truck 203 contact a grader and not AC14 as he passed (Tr. 99, 185–186, 222, 381). Tartaglia wanted to know the identity of the driver, but Mikes did not know (Tr. 381). Tartaglia also asked for a copy of the recording, but Mikes denied his request at that time (Tr. 102, 191, 223, 383). At some time during the meeting, O'Neill or Mikes asked Tartaglia to complete another witness statement, but Tartaglia refused (Tr. 100–101, 223). Tartaglia then spoke to Rusinski, asking why the scene was not frozen and why he was not contacted in some way as soon Rusinski became aware of the incident (Tr. 100, 186, 223, 383). Tartaglia and Rusinski testified that they argued, and O'Neill asked Tartaglia if he wanted to "stick with his story" (Tr. 100, 186–187, 188, 223, 383–384). Tartaglia then spoke to Mikes, telling him that the time had been changed on the recording, that he believed the recordings had been tampered, and that he had been wrongfully terminated before and he felt it was happening again (Tr. 186, 223, 384–386). Tartaglia said to Mikes, "I'm calling you out, Dustin Mikes, because I've had the same issues with you before with information and tampering of information as well" (Tr. 384).[31] Tartaglia said to Mikes that he had put him on notice (Tr. 101, 188, 224). O'Neill testified that he did not know what Tartaglia meant when he made that statement to Mikes. Mikes asked Tartaglia why he was being placed on notice and what were the issues, and O'Neill and Mikes testified that Tartaglia said that Mikes knew why (Tr. 101, 226–227). O'Neill ended the meeting when Rusinski and Tartaglia's arguing continued (Tr. 102–103, 223, 228, 386).[32]

After Tartaglia left the meeting, O'Neill, Rusinski, and Mikes discussed what had transpired (Tr. 228). At that time, Rusinski learned that they had planned to issue Tartaglia a coaching (Tr. 192–193). O'Neill decided to terminate Tartaglia because he was not being honest; Mikes role at this time was to then speak to senior leadership including Kudadiri (Tr. 106–107, 128–129, 135, 234, 252-253, 258). O'Neill and Mikes admitted that they did not investigate Tartaglia's claims that Mikes tampered with the recording, but at some point, before

[31] Tartaglia testified that he felt that Mikes was unfair because Mikes, during the arbitration concerning his 2017 termination, presented "over a dozen witnesses" who were "pathetic" as all the witnesses "were put up to not tell the truth" (Tr. 536).

[32] Mikes took notes during this meeting (GC Exh. 9). These notes generally corroborate the testimonies of Mikes, O'Neill, and Rusinski as to what occurred during this meeting. Tartaglia accused Respondent of a bad investigation, "stuff" missing and tampering with evidence. Mikes' notes reflect that Rusinski explained to Tartaglia that he spoke to him late due to speaking to everyone else involved in the near miss. After Tartaglia told Mikes several time that he was placing him on notice and was corrupt, Mikes wrote that Tartaglia said, when asked to specify what he meant about placing on Mikes on notice, "You very well know, issues, on notice" (GC Exh. 9). Mikes wrote that Tartaglia continued to speak over the recordings and kept getting "louder and louder" (GC Exh. 9).

he was terminated, Fendrich and Mikes investigated Tartaglia's claim that the driver of truck 203 passed AC14 without permission (Tr. 108–109, 235). Fendrich reviewed the GPS records, provided by dispatch, for the locations of Tartaglia's haul truck 129 and haul truck 203 between 9:07 to 9:11 a.m. on February 5, 2020 (GC Exh. 50; Tr. 688–690). Fendrich specifically testified that based on the positions and distance between haul truck 129 and haul truck 203, the haul trucks were 25 to 30 minutes apart from one another and nowhere near one another between 8:45 and 9:10 a.m. (Tr. 695, 707–709). Furthermore, Fendrich testified that AC14, which does not have a GPS locator on the equipment, began moving at 8:48 a.m. which is the same time Covey logged in (Tr. 706, 710; R. Exh. 29).

After the meeting with Tartaglia, O'Neill prepared a witness statement to document the meeting (GC Exh. 10). O'Neill wrote, in part, "I asked Pete to tell me the events that had happened, referring to the event on the 5th of Feb. Pete stated that he had permission to pass AC#14. I told Pete that we had other witness statements stating that he did not have permission to pass AC#14. I asked Pete if he wanted to stick to his story and he said yes. Pete asked to hear the recording, so we played the recording of the events that day. Pete then started to get upset and accused Dustin of tampering with the recording. Pete told Dustin that he was putting him on notice. Dustin asked Pete why you putting me on notice, and Pete stated you know why. Dustin asked Pete if he wanted to fill out another witness statement and Pete refused. We were done with Pete at that time and Pete left" (GC Exh. 10 (errors in original)).

Rusinski also prepared a witness statement after this meeting ended (GC Exh. 11). Rusinski wrote, in part, "[O'Neill] asked [Tartaglia] about [passing a drill and Tartaglia] said he had gotten clearance to pass. [Mikes] proceeded with playing the recordings of the conversations on that day. It was very clear that [Tartaglia] was told to hold back [and] not pass but he did anyways. Ron the driller had told me that he started to turn the drill [and] he seen at the last second [Tartaglia] proceed to pass [and] he stopped turning the drill. Ron mentioned that if he had continued turning that the mast of the drill would of smashed the cab of the truck. During the recording [Tartaglia] was confrontational with [Mikes]. He kept interrupting the recording to ask who was on 203 that was ahead of him. In the recording 203 had called [and] got clearance to go around the blade that was blading on the level. Then all of the sudden [Tartaglia] went off on [Mikes] about tampering with evidence [and] he said this is not the first time he has done this. He told [Mikes] he is putting him on notice. I tried to ask [Tartaglia] a question about what he said to me when he got out of the truck [and] he asked me what did I say. It ended in a pissing match. [O'Neill] stopped the meeting [and] that was it" (GC Exh. 11 (errors in original)).

Also on February 13, 2020, Rusinski prepared a witness statement regarding his discussion with Tartaglia on February 5, 2020 (GC Exh. 21).[33] Rusinski wrote that on February 5, 2020, at 12:15 p.m., he "contacted [Tartaglia] to get a witness statement from him for the incident that happened when he called to pass a drill. [Tartaglia] was upset about it. He filled the witness statement out [and] proceeded to complain about it. When he was done he handed the statement to me that this is a bunch of "bullshit" [and] then he slammed the door of the truck

[33] Rusinski had been on leave from work from February 6, 2020, until the evening of February 13, 2020 (Tr. 183-184).

[and] left. I forgot to mention that [Tartaglia] was upset that I didn't get to him until 4 hrs later. I told him that I had several other people to get statements from [and] he just happened to be the last" (GC Exh. 21).

After this meeting, Tartaglia sent Mikes several emails, at 8:28, 8:45, and 8:55 p.m. (Tr. 229, 386–387). Tartaglia wrote to Mikes that he was placing him on "Official Formal Notice" accusing him of tampering with this investigation as well as investigations involving Tartaglia in the past. Tartaglia informed Mikes that he had a complaint against him at a "federal agency." Tartaglia claimed that haul truck 203 was ahead of him, and there was 1 hour and 10-minute difference in the recording (GC Exh. 13). In the next email, Tartaglia warned Mikes that he was being placed on notice and that he would "be moving to the next level with another complaint" (GC Exh. 13). Tartaglia sent a third email, noting that Mikes refused to give him information from the investigation (GC Exh. 13). Tartaglia never specified which federal agency he planned to contact. Mikes did not reply to the emails when he received them later that evening but instead forwarded the emails at 10:35, 10:52, and 10:57 p.m., to his supervisor, Michelle Kessler (Kessler), Kessler's supervisor Amy Sexton, and the general counsel Lori Higuera (Tr. 230). Mikes denied knowing what Tartaglia meant when he repeatedly told Mikes he was placing him on notice and denied knowing that the federal agency to which Tartaglia referred was the Board (Tr. 231–232, 255). Fendrich testified that Mikes also showed him the emails Tartaglia sent to him (Tr. 749).

February 21, 2020, Termination

Kudadiri testified that he made the final decision to terminate Tartaglia (Tr. 102, 310, 312, 752).[34] Kudadiri testified that he read all the witness statements including Tartaglia's statements, and he listened to the recording (Tr. 319). Kudadiri also testified that he was aware that prior to termination, a nonverbal written coaching was prepared for Tartaglia (Tr. 311). Kudadiri testified that Mikes told him about the emails Tartaglia sent him after the February 13, 2020, meeting, but he did not review or see them (Tr. 317–319). Kudadiri testified that Tartaglia was not terminated for sending the emails to Mikes (Tr. 316). Kudadiri also testified that he was not aware that Tartaglia had filed charges with the Board in the past (Tr. 305).

[34] Kudadiri provided confusing testimony as to who made the final decision to terminate Tartaglia. Kudadiri initially testified under Federal Rules of Evidence 611(c) (Sec. 611(c)) that Mikes recommended terminating Tartaglia (Tr. 310). However, during direct examination as well as a direct question from me, Kudadiri testified that he spoke to O'Neill and Rusinski who recommended termination for Tartaglia while Mikes did not make any recommendations (Tr. 313). What is clear from the testimonies of Fendrich, Mikes and O'Neill, whom I credit as will be discussed further, is that this decision to terminate Tartaglia was a discussion between the supervisors and human resources (Tr. 234–235). In the end, Kudadiri made the final decision to terminate Tartaglia after reviewing the investigatory evidence (Tr. 313–314).

On February 21, 2020, LaFon[35] discharged Tartaglia for violation of Respondent's "Guiding Principles, 'misrepresenting material facts' regarding a safety incident, and not 'Living up to the Guiding Principles' Core Value of Integrity."[36] Mikes was present when LaFon presented Tartaglia with the discharge paperwork (Tr. 237, 276, 390).[37] LaFon read the entire termination letter to Tartaglia before handing him a copy (Tr. 276, 391–392). This letter described the specific violation:

> On 2/13/20, you returned from IWP (Investigatory Leave with Pay) after an investigation into allegations that while driving haul truck No. 129 on 2/05/20 you failed to follow safe procedures by passing another piece of equipment when expressly warned not to do so, which led to a near miss situation. The evidence gathered during that investigation, which included the two-way radio recordings of that event, confirmed allegations that you were clearly denied permission to pass, but did so in spite of that denial. When asked again during the meeting on 2/13/20 about the incident, you said you were not denied permission to pass and, in fact, had received permission to pass the equipment. Even when the radio recordings from that event were played for you, which indisputably showed you were denied permission to pass, you continued to misrepresent what happened, effectively said your co-workers who witnessed your safety violations were either dishonest or wrong, and failed to be accountable or take responsibility for your actions. Your actions are inconsistent with the Company's Core Value of Integrity, and do not meet the expectations for conduct outlined in the Guiding Principles.

Thereafter, the letter provided background information as follows:

---

[35] LaFon was on vacation from February 6 to 20, 2020, and was not involved in the near miss investigation (Tr. 273). Before leaving on vacation, LaFon was aware of the near miss as Rusinski notified him of the incident (Tr. 273–274).

[36] In Respondent's Guiding Principles, the integrity section calls for employees to accept personal responsibility for all actions and decisions, be honest and transparent, and communicate openly and accurately. Furthermore, refusal to cooperate in an investigation or concealing/misrepresenting material facts could result in immediate discharge (R. Exh. 1).

[37] Mikes and Fendrich helped draft and provide the letter to LaFon (Tr. 237, 275, 751). The termination letter was also reviewed by Kudadiri as well as Kessler (Tr. 757). Fendrich testified that Tartaglia was discharged for not being honest and forthright during the investigation as well as acting dishonestly when he accused the driver of haul truck 203 of improper passing, which the evidence did not support (Tr. 685–686). Fendrich testified that the termination letter included reference to the emails Tartaglia sent to Mikes on February 13, 2020, as the emails were "simply part of the story" (Tr. 751). Fendrich also testified that the emails were "not the reason for the termination whatsoever" (Tr. 751). Fendrich continued that the emails were included because they were "still part of the relevant background continuing to not to take responsibility, to try to push blame to other things, to—not own it, in other words to continue to misrepresent material facts, which was the reason for the termination" (Tr. 751).

> During the investigation of the 2/05/20 safety incident, you were angry and upset about being required to provide a statement of the event to the Supervisor, and you acted unprofessionally and disrespectfully, including telling the supervisor this was "bullshit", slamming a truck door and driving away. Your angry, unprofessional and disrespectful behavior continued during the meeting in mine operations on 2/13/20, including loudly talking over the recording while it was playing so it could not be heard and accusing the Company of tampering with or falsifying the radio recordings. After the meeting, you sent several emails to the HR Generalist [Mikes], which among other things, placed him "on notice" and accused him of altering, fabricating, and tampering with the radio recordings. Prior to and at the start of the meeting on 2/13/20, the Company intended to issue a Coaching and Feedback (non discipline) for your unsafe behavior on 2/05/20. But after you were repeatedly and insistently dishonest about the 2/05/20 safety incident (even after being confronted with the radio recording of the event), and refused to acknowledge your actions or take responsibility for them, it was determined that a Coaching and Feedback would have been futile and that termination was warranted by the facts.

(GC Exh. 14). Tartaglia signed his discharge documentation "under protest," "not true," and "false" and wanted copies of both which Mikes provided. Mikes testified that Tartaglia said the discharge was "bullshit" and put Mikes on notice and that he was turning his discharge over to a federal agency before leaving the meeting (Tr. 240, 277; GC Exh. 22).

After this meeting, LaFon wrote a witness statement concerning the discharge meeting (GC Exh. 12). LaFon wrote that Tartaglia stated that his termination was "fabrications and lies" and "bullshit" (GC Exh. 12). LaFon wrote that as Tartaglia was leaving, he told Mikes, "You are on notice, you are on notice buddy" and that he was turning over the termination to a federal agency (GC Exh. 12; Tr. 279).

Tartaglia appealed his discharge via the problem-solving procedure, but the removal decision was upheld at step 3 (Tr. 393-394; GC Exh. 15).[38] On October 29, 2020, Tartaglia and Respondent arbitrated his removal before Arbitrator Zigman, and his removal was upheld on December 18, 2020 (Tr. 397–398; R. Exh. 45).

In addition, between February 13, 2020, and February 24, 2020, Eisner, Potter, and Covey along with two other employees who were at the scene of the February 5, 2020, near miss incident were each given nondisciplinary written coaching for failing to freeze the scene (Tr. 141–142, 194–195, 249–250, 281–282, 416, 423–424; R. Exh. 25, 26, and 27). None of these employees had been issued a final written counseling in the year prior unlike Tartaglia (Tr. 251).[39]

[38] Particularly, at step 3, the decisionmaker Vicki Seppala noted that Tartaglia was being terminated only for two items listed in the opening paragraph of the termination notice. (GC Exh. 15).

[39] Towards the conclusion of the hearing, Respondent sought to introduce the disciplinary actions of 13 employees for dishonesty or misrepresentation (Tr. 729). Over CGC's objection, I

Credibility

Although Tartaglia was not terminated for passing without permission, a credibility determination as to Tartaglia's truthfulness goes to the heart of why he was terminated by Respondent. In this matter, the documentary as well as recorded evidence is clear as to whose testimony should be credited and whose testimony should not. I cannot credit Tartaglia's testimony regarding what occurred on February 5, 2020. Tartaglia testified in an unfocused, confusing manner where he needed to be redirected several times. Tartaglia would often not answer questions directly and appeared to have set in his mind as to what he wanted to say during the hearing rather than respond to the questions. Even when I asked him direct questions to clarify the record, Tartaglia would not respond directly to the questions. Tartaglia's consistent failure to testify truthfully even when confronted with contradictory evidence undermines his credibility in this hearing. Tartaglia was not given permission to pass Eisner, and Eisner denied Tartaglia's request to pass. Tartaglia's claim that Eisner's permission for him to pass is missing from the recording is not based on the overwhelming evidence that he was not given permission. Furthermore, when confronted with evidence that he did not receive permission to pass, Tartaglia focused his ire on Rusinski's failure to contact him immediately, Potter's alleged lack of communication the prior day, and an alleged unknown truck driver who passed without permission prior to him. Tartaglia's obfuscation of the truth undermines his credibility.

The record contains other instances where Tartaglia simply testified untruthfully, or at the very least, less than honestly. For instance, Tartaglia testified that Fendrich and O'Neill did not give him a copy of the March 22, 2019 letter, which outlined the two choices he had to make by March 31, 2019. However, a subsequent email from Tartaglia to Fendrich makes clear that Tartaglia had received the letter (GC Exh. 5).

Tartaglia also testified that at the February 13, 2020 meeting he let Mikes know he would be filing a complaint, and "had charges opened with him" (Tr. 385). Tartaglia testified that he

---

admitted these disciplinary actions (R. Br at 51). Although CGC had received these documents in response to the General Counsel's subpoena request, CGC only questioned Respondent's responsiveness to its subpoena request at that time. CGC requested an adverse inference be drawn against Respondent for failing to produce the investigatory documents supporting the disciplinary actions (Tr. 720–729; GC Exh. 28 (request 22); GC Br. at 29–30). At the hearing, counsel for Respondent explained that Respondent believed that they complied with the subpoena request, and never heard from CGC that he took the position that the document production for request 22 was incomplete (Tr. 728). Based on these circumstances, I decline to draw an adverse inference. See *Tom Rice Buick*, 334 NLRB 785, 786 (2001). Putting aside the fact that CGC did not inform Respondent until the last day of the hearing that he did not believe that Respondent had fully complied with the subpoena request, CGC has not shown that the investigatory documents underlying these disciplinary actions would be relevant and necessary to prove or disprove that Respondent's decision to terminate Tartaglia was discriminatory. Turning to the actual disciplinary actions, I have not considered them as Respondent's counsel did not explain their relevance or consistency with Tartaglia's discipline except to state that other employees had been disciplined or terminated for dishonesty or intentionally misrepresenting material facts (R. Br. at 41).

meant a complaint with the Board (Tr. 385). Tartaglia elaborated when Mikes continued to say he did not know what that meant that he made it clear that he had "issues with you before, falsifying information, tamper with information. This is not the first time that this has happened" (Tr. 385). I do not credit Tartaglia's testimony that he told Mikes during this meeting that he would be filing a complaint and charges against him with the Board. Mikes' contemporaneous notes as well as the written statements by O'Neill and Rusinski do not support such testimony. Instead, Tartaglia placed Mikes on notice, which the record shows that Tartaglia does often when he disagrees with a decision by Respondent. The record also shows that when placing individuals on notice, Tartaglia would not specify what he meant and would simply state that the person he placed on notice knew what he was talking about. Tartaglia also would blame the "issues" and "stuff" he had ongoing with Respondent that prevented him from completing the training in 2019. However, when discussing the "issues" and "stuff," Tartaglia again would not be specific as to what he was referring but would mention improper reimbursement or ongoing litigation of various sorts. Even Tartaglia's emails to Mikes after the February 13, 2020 meeting do not specify which federal agency he would be contacting. Tartaglia's vagueness undermines any claim from the General Counsel that Respondent's supervisors knew to what specifically Tartaglia referred.

As for Respondent's witnesses, I credit Eisner's testimony in full. Eisner's contemporaneous written statement, audio recording of the radio transmission, and hearing testimony were consistent in his denial of permission to Tartaglia to pass. I also credit Potter's testimony in full as his contemporaneous written statement and audio recording were consistent. Potter and Eisner's testimonies were accurate and corroborated one another. However, I cannot rely on Covey's testimony in full because her recollection of the details as to Eisner's response to Tartaglia on February 5, 2020, are not consistent with the audio recording. Instead, I rely on Covey's contemporaneous statement.

I credit O'Neill's testimony in full. O'Neill testified consistently as both a Sec. 611(c) witness as well as on direct and cross-examination, and his testimony was corroborated by his contemporaneous witness statements. His recall of details of what occurred during the February 13, 2020 meeting is remarkably accurate when compared to his contemporaneous written statement. I also credit his testimony that after the meeting with Tartaglia on February 13, 2020, he decided that Tartaglia's dishonesty warranted termination, not a nonverbal written coaching. O'Neill made this decision before he knew about the subsequent emails Tartaglia sent to Mikes that evening. Mikes also corroborated this decision and its timing.

Kudadiri could recall some events but not all events involving Tartaglia. Kudadiri seemed to be trying to recall with earnest. I do not discredit Kudadiri with his seemingly inconsistent testimony as to who made the decision to terminate Tartaglia. Kudadiri twice confirmed that he made the decision despite testifying initially that Mikes made the decision to terminate. Nothing in this record, or in Kudadiri's testimony would support such a statement that Mikes made the decision to terminate. Indeed, in the past, Kudadiri also made the decision to issue Tartaglia a final written counseling—nothing in the record suggests human resources made these decisions. Instead, the record supports a finding that human resources would advise the supervisors who would make the decisions. Furthermore, I credit Kudadiri's testimony that

he was not aware of Tartaglia's unfair labor practice charges with the Board. The record contains no evidence that he was in receipt of the charges or participated in the investigations.

As for Rusinski, I found him least credible of Respondent's witness. As a Sec. 611(c) witness, Rusinski testified reluctantly and vaguely. Rusinski also testified that Potter contacted him via radio regarding the near miss incident, but the credited testimony of Potter indicates that Potter approached Rusinski about the near miss incident. Rusinski also testified inconsistently with Mikes, O'Neill and Kudadiri that neither Mikes nor O'Neill wanted to terminate Tartaglia. Rather, as credited, O'Neill made the decision to terminate Tartaglia, rather than issue a nonverbal written coaching, after the February 13, 2020, meeting. Subsequently, Kudadiri agreed that Tartaglia should be terminated for violating Respondent's policies.

Finally, I credit the testimonies of Fendrich and Mikes. The evidence shows that Mikes was not involved with any investigations involving Tartaglia until the February 5, 2020 incident. Mikes was also unaware of any Board charges that Tartaglia had filed, and none of the allegations in these charges named or concerned Mikes. Moreover, Mikes and Fendrich testified consistently that the audio recordings could not be tampered or altered. Furthermore, the credited evidence shows that O'Neill's decision to terminate Tartaglia came before Mikes received the emails from Tartaglia on February 13, 2020. I do not find that O'Neill, Mikes, or Kudadiri were influenced by Tartaglia's placing Mikes on notice during the February 13, 2020 meeting, or Tartaglia's subsequent emails to Mikes which occurred after O'Neill made the decision to terminate Tartaglia and had no role in Kudadiri's decision to terminate Tartaglia. As the record shows, Tartaglia placed individuals on notice when he was not satisfied with the outcome of allegations towards him.

III. LEGAL ANALYSIS

At complaint paragraph 5, the General Counsel alleges that Respondent violated Section 8(a)(4) and (1) of the Act when Tartaglia was discharged on February 21, 2020, because he filed Board charges in cases 28–CA–210296, 28CA–234240, 28–CA–241240, and 28–CA–247609, cooperated in the investigation of those charges, and threatened to file a charge with the Board. An employer violates Section 8(a)(4) of the Act when it discharges an employee for filing or threatening to file charges or give testimony under the Act. See *NLRB v. Scrivener*, 405 U.S. 117 (1972); *First National Bank & Trust Co.*, 209 NLRB 95 (1974); *Airgas USA, LLC*, 366 NLRB No. 104 (2018) (participation in Board activities), enfd. 916 F.3d 555 (6th Cir. 2019); *Nolan Enterprises, Inc. d/b/a Centerfold Club*, 370 NLRB No. 2, slip op. at 2 (2020) (employer unlawfully discharged an employee for filing unfair labor practice charges against past employers and for threatening to file a charge against the employer); *Rhino Northwest, LLC*, 369 NLRB No. 25, slip op. at 1 (2020) (finding testifying at a Board hearing was a motivating factor for deactivating an employee from the active list).

To determine whether the employee's discharge violates Section 8(a)(4), the Board applies the burden shifting analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB*

v. Transportation Management Corp., 462 U.S. 393 (1983).[40] See *Taylor & Gaskin, Inc.*, 277 NLRB 563 fn. 2 (1985); *American Gardens Management Co.*, 338 NLRB 644 (2002). In *Wright Line*, which is used in mixed-motive cases, the General Counsel has the initial burden of establishing, by a preponderance of the evidence, that the employee's protected conduct was a motivating factor in an employer's adverse action. The General Counsel satisfies this initial burden by showing: (1) the employee's protected activity; (2) the employer's knowledge of that activity; and (3) animus. See also *Security Walls, LLC*, 371 NLRB No. 74, slip op. 3 (2022); *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 203 (2019). Animus may be based on direct evidence or inferred from circumstantial evidence based on the whole record. Circumstantial evidence of discriminatory motive may include evidence of suspicious timing, false or shifting reasons provided for the adverse employment action, failure to conduct a meaningful investigation of the alleged misconduct, departures from past practices, tolerances of similar behavior for which the employee was allegedly remove, and/or disparate treatment of the employee. See *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 4, 8 (2019). The evidence must be sufficient to establish a causal relationship between the employee's protected activity and the employer's adverse action. *Tschiggfrie*, supra, slip op. at 8.

[40] The General Counsel argues that Respondent's termination of Tartaglia should be analyzed using the framework established by the Supreme Court in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964) (GC Br. at 14–20). I disagree for two reasons. First, 8(a)(4) allegations have been analyzed consistently by the Board with the *Wright Line* framework when employer motivation is at issue. See *Freightway Corp.*, 299 NLRB 531, 532 (1990); *P.I.E. Nationwide*, 295 NLRB 382 (1989). Secondly, *Burnup & Sims* applies when an employee's discipline independently violates the Act, regardless of the employer's motive or a showing of animus, where "the very conduct for which employees are disciplined is itself protected concerted activity." *Burnup & Sims*, supra at 976. Here, Respondent terminated Tartaglia for "misrepresenting material facts" regarding a safety incident and violating Respondent's principles on integrity. Thus, Respondent's motivation is at issue. The General Counsel's claim that Tartaglia's disagreement with Respondent's investigatory evidence is a continuation of his claim that Mikes tampered with the evidence and an extension of his prior Board activities is not based on the credited evidence (GC Br. at 16). There is no evidence in this record that Tartaglia complained to the Board that Mikes tampered with evidence in the past—the only reference to tampering with the evidence occurred in 2019 based on Tartaglia's testimony. Moreover, Tartaglia's allegations of tampering would not be concerted as this issue only applied to himself and was not claimed by Tartaglia to initiate or invoke group action. See *Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at 7 (2019). To fall within the Act's protection, the Section 7 activity must have some relationship to the wages, hours or other terms and conditions of employment of employees and not to matters that are personal or unrelated to those subjects. *MCPc, Inc.*, 360 NLRB 216 (2014). Finally, Tartaglia never told Mikes, O'Neill, or Rusinski in this meeting that he would be filing a charge with the Board. Instead, Tartaglia placed Mikes "on notice" and when asked what he meant, Tartaglia simply said that they knew what he meant. Even prior to this meeting, Tartaglia would place individuals on notice when he was not satisfied with a decision, and this "notice" meant any myriad of "issues" he perceived. In sum, *Burnup & Sims* is not applicable in this instance.

If the General Counsel meets this initial burden, the burden shifts to the employer to prove that it would have taken the adverse action, even absent the employee's protected activity. See, e.g., *Mesker Door*, 357 NLRB 591, 592 (2011). The employer must show that it would have taken the same action in the absence of the protected conduct. If the employer's proffered reasons are pretextual, the employer fails to show that it would have taken the same action regardless of the protected conduct. The Board in *General Motors LLC*, 369 NLRB No. 127, slip op. at 10 fn. 27 (2020), explained that the *Wright Line* standard "presupposes that the employee actually engaged in the misconduct." In other words, *Wright Line* applies in mixed motive cases, where it appears that unlawful considerations were a motivating factor in the discipline decision, but where the record supports the potential existence of one or more legitimate justifications for the decision. *Felix Industries*, 331 NLRB 144, 146 (2000), remanded on other grounds 251 F.3d 1051 (D.C. Cir. 2001).

As an initial matter, I must decide whether Tartaglia was engaged in protected concerted activity and whether the employer had knowledge. For activity to be protected under Section 7 of the Act, an employee's conduct must be both 'concerted' and engaged in for the purpose of 'mutual aid or protection." *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153 (2014). Activity is concerted if it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), revd. sub nom *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). While no group action may have been contemplated, activity by a single individual is concerted, where the concerns expressed by the employee are a logical outgrowth of concerns previously expressed by a group. *Summit Regional Medical Center*¸357 NLRB 1614, 1617 fn. 13 (2011); *Amelio's*, 301 NLRB 182, 182 fn. 4 (1991).

Tartaglia engaged in protected concerted activity in the past when he filed charges with the Board prior to being terminated. At various points in time from 2017 to 2019, O'Neill and Fendrich were aware of Tartaglia's Board charges. Kudadiri, the final decisionmaker, denied any knowledge of Tartaglia's Board activity. The record is devoid of any evidence that Rusinski and Mikes were aware of the prior Board charges. While Tartaglia placed individuals on "notice" during his employment, he did not specify to what he referred. In the past, Tartaglia placed many individuals on notice, and subsequently, filed complaints with MHSA, Respondent's problem-solving procedure, the Industrial Commission of Arizona, *and* the Board.

But during the February 13, 2020 meeting, Tartaglia did not specify what he meant when he placed Mikes on notice. I do not credit Tartaglia's claim that he told Mikes, Rusinski and O'Neill that he was planning to file a charge with the Board, and the record does not support an assumption that they knew Tartaglia's use of the term "notice" meant that he would go to the Board. Even Tartaglia admitted that when he says he is placing individuals on notice, he means that he has an "issue" with them. Furthermore, although Tartaglia engaged in protected concerted activity by filing charges with the Board in the past. I find that Tartaglia's claim that Mikes tampered with evidence is griping of a purely personal nature, not concerted action. *Quicken Loans, Inc.*, 367 NLRB No. 112, slip op. at 3–4 (2019). Such claims are not protected by the Act. Thus, I do not find that Tartaglia engaged in protected concerted activity during this

meeting. However, for the sake of argument, I will consider Tartaglia's past unfair labor practice charges as protected concerted activity for this analysis. Moreover, Fendrich and O'Neill admitted to having some knowledge of this activity.

Next, the General Counsel must show that Tartaglia's conduct of filing charges with the Board, cooperation with the Board in the investigation of those charges and threatening to file a charge with the Board was the motivating factor in Respondent's decision to terminate him. I find that neither direct nor circumstantial evidence supports the General Counsel's allegation that Respondent terminated Tartaglia for his participation in Board activity. See *BS&B Safety Systems, LLC*, 370 NLRB No. 90, slip op. at 2 (2021) (finding no violation of Sec. 8(a)(4) due to the General Counsel's failure to make an initial showing of discrimination based on the employee's Board activities). First, the timing is not suspicious. Tartaglia last filed an unfair labor practice charge with the Board in September 2019 while Tartaglia's termination occurred in February 2020. The General Counsel presented no evidence of interim activity by Tartaglia or Respondent with any Board actions. Furthermore, the investigation of the near miss was prompted by an employee who had assumed the incident would have been reported. There is no evidence that Respondent fabricated the evidence or sought out to discipline Tartaglia. Moreover, Respondent decided to issue Tartaglia a non-verbal written coaching after reviewing the evidence of the witness statements and radio recording. Only after confronting Tartaglia with the evidence that proved that he did not receive permission to pass did O'Neill decided to terminate Tartaglia rather than counsel him. Even during this meeting, Tartaglia never made a statement that he would be filing a charge with the Board, and instead put Mikes on notice for tampering with the evidence. It is unreasonable to conclude that Mikes, O'Neill and Rusinski should have known that Tartaglia's statement to Mikes was his invocation of a Board action. O'Neill made his decision before Tartaglia sent several emails to Mikes that evening placing him on notice and that he had a complaint with a federal agency. Even in the past Tartaglia admittedly placed individuals on notice, and Respondent did not seek to punish him for his right to appeal the disciplinary actions to any entity including the Board.

Second, Respondent never provided shifting or false reasons for terminating Tartaglia. The termination letter to Tartaglia provides background of the events surrounding the reasons for Respondent's decision to terminate Tartaglia but clearly states that he is being terminated for misinformation and for violating Respondent's policy on integrity. Kudadiri, who made the final decision to terminate Tartaglia, acknowledged that Mikes had received several emails after the February 13, 2020 meeting, but he testified consistently with the reasons Respondent terminated Tartaglia. Even in the subsequent problem-solving steps, Respondent's deciding officials also noted that Tartaglia was terminated for misinformation and lack of integrity. Respondent never changed or waivered on the basis for its decision to terminate Tartaglia. In addition, Respondent followed progressive discipline where termination was the next step after the final written counseling had been issued within the prior year.

Third, Respondent conducted a thorough investigation of the near miss. Respondent investigated Tartaglia's claim that another driver passed ahead of him without permission. Based on Respondent's investigation, O'Neill decided that Tartaglia should be issued a non-verbal written coaching as the other employees involved would be issued. Only when Tartaglia continued to deny the evidence when confronted did Respondent decided to terminate him for

misrepresenting material facts and violating their principles of integrity. Respondent admittedly did not investigate Tartaglia's claims that Mikes tampered with the evidence. However, Fendrich credibly testified that the radio recording cannot be tampered, and thus, it seems unreasonable for Respondent to investigate an allegation that is impossible.

Finally, the General Counsel has failed to show any animus and causal connection between Tartaglia's filing of Board charges and the decision to terminate him. Simply because Tartaglia has filed charges with the Board and participated in Board activity does not shield him from lawful discipline. The General Counsel has not shown any connection between Tartaglia's activity and Respondent's decision to terminate him. Instead, Respondent prepared to issue Tartaglia a nonverbal written coaching, and there is no evidence that suddenly after the meeting O'Neill decided to terminate Tartaglia because he placed Mikes on notice for tampering with the evidence—Tartaglia has placed individuals on notice in the past and there is no evidence that Respondent retaliated against him for making similar comments. Kudadiri, the final decision maker, had no knowledge of Tartaglia's prior activity, and O'Neill participated in the investigation of a Board charge filed by Tartaglia sometime in 2017 or 2018. The General Counsel attempts to string together past actions by Tartaglia and his vague comments to show some causal connection, but the attempt fails. Respondent's decision to terminate Tartaglia is well supported and not discriminatory. Based on the foregoing, I dismiss the allegation in complaint paragraph 5.

At complaint paragraph 4, the General Counsel alleges that on about February 21, 2020, LaFon, in writing, threatened Tartaglia with discharge for filing charges with the Board thereby violating Section 8(a)(1) of the Act. The General Counsel argues that when LaFon read aloud the termination letter to Tartaglia which included as background that he sent several emails to Mikes placing him "on notice" and accusing him of tampering with the evidence, LaFon threatened Tartaglia with termination for complaining to the Board (GC Br. at 12–14).

Section 8(a)(1) of the Act provides that it is an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7. It is an unfair labor practice for an employer to discipline or threaten to discipline an employee for filing a charge or expressing intent to file a charge with the Board. See *OPW Fueling Components*, 343 NLRB 1034 (2004); *Grand Rapids Die Casting Corp.*, 279 NLRB 662 (1986). In determining whether an employer has made a threat in violation of Section 8(a)(1), the Board applies an objective standard of whether the statement would reasonably tend to interfere with, restrain, or coerce an employee in the exercise of their statutory rights, regardless of the motivation for the statement or its actual effect. See *Divi Carina Bay Resort*, 356 NLRB 316, 320 (2010), enfd. 451 Fed.Appx. 143 (3d Cir. 2011). The Board also considers the totality of the relevant circumstances. *Mediplex of Danbury*, 314 NLRB 470, 471 (1994).

I conclude based on the totality of the circumstances that LaFon did not threaten Tartaglia with discharge for planning to or filing charges with the Board. The inclusion of the reference to emails sent by Tartaglia to Mikes after the termination meeting was background material and not the basis for the termination—context matters. The General Counsel unreasonably seeks to conflate the background facts with the basis for the decision to terminate Tartaglia. The General Counsel's argument that the inclusion of the reference to the emails was coercive and threatening

and would lead an objective employee to conclude that placing the employer "on notice" would mete out punishment is not a reasonable connection based on this record—simply mentioning Tartaglia's subsequent actions after the basis for terminating him was established does not lead to the conclusion that an employee would objectively feel threatened for planning to or seeking to file a charge with the Board. Furthermore, as discussed above, I disagree with the General Counsel's contention that Tartaglia was engaged in protected activity during the February 13, 2020 meeting (GC Br. at 13–14). For the reasons discussed above, I conclude that the complaint allegation at paragraph 4 should be dismissed.

CONCLUSIONS OF LAW

1. Respondent, Freeport McMoRan Bagdad, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent did not violate the Act as alleged.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[41]

IV. ORDER

The complaint, as amended is dismissed in its entirety.

Dated, Washington, D.C. June 24, 2022

Amita Baman Tracy
Administrative Law Judge

[41] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.